DOCUMENT RESUME

ED 180 008 CS 502 712

AUTHOR Bruhn, Diane: Alley, Susan
TITLE Physician Advertising: The Debate.
INSTITUTION Freedom of Information Center, Columbia, Mo.
REPORT NO FOI-413
PUB DATE Nov 79
NOTE 9p.

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Court Litigation: *Federal Regulation: *Freedom of Speech: Health Personnel: Health Services: *Physicians: Professional Personnel: *Publicize: Public Relations
IDENTIFIERS *Advertising

ABSTRACT

In the area of commercial speech, the courts face two competing rights: the public's right to know and the state's right to discipline members of the medical profession. The Federal Trade Commission has taken strong action against medical advertising prohibitions, and legal precedents have been set in Virginia Board of Pharmacy v. Virginia Citizens Consumer Council and Bates v. State Bar of Arizona. In some states, physicians have been allowed to advertise their services and prices, but they are not allowed to use testimonials or comparative advertising techniques. The precedents, as well as the problems, that have been created by the advertising of pharmacy, legal, and dental services indicate that physicians also will be permitted to advertise: but how this lifting of the medical advertising ban will affect professional standards and image remains to be seen. (RL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED180008

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA
NOVEMBER, 1979

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Freedom of Information Center
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

FREEDOM OF INFORMATION CENTER REPORT NO. 413

PHYSICIAN ADVERTISING: THE DEBATE

This report was written by Diane Bruhn, a M.A. candidate at the University of Missouri School of Journalism, and supplemented with segments of a report written by Susan Alley, also a M.A. candidate at the University of Missouri School of Journalism.

"Promise, large promise is the soul of an advertisement."

The problem in distinguishing between performance and promise in commercial speech has been compared to the impossible labors of Sisyphus. The problem has been compounded in the last three years, because professionals, previously barred by an historic, legal and social prohibition against commercial speech, now show an increasing interest in advertising their services. The result: a pitched battle rages over the new efforts to regulate the commercial act, the copy and the media.

It wasn't always so difficult. In the Middle Ages, the professions advertised by their habilement. Doctors were walking advertisements, readily recognizable by their "purple or red gowns and furred hoods," wearing "belts of silver thread and embroidered gloves," according to Barbara Tuchman's encyclopedic, **A Distant Mirror: The Calamitous 14th Century**.[1] Boccaccio's Doctor Simon went even further: he advertised his specialty — the proctologist's art — by painting a chamber pot over his door. The degree of sophistication nothwithstanding, professional advertising no longer enjoys this same latitude.

For, as the times have increased in complexity, so have they compounded the difficulty through which an individual must struggle in order to obtain adequate information about matters affecting his well-being. At least three strata of obstacles currently can prevent him from receiving information needed to make meaningful choices. Access to vital information can be withheld by government — either through legitimate reasons or through a bureaucratic predisposition to secrecy. Access can be denied by private organizations fearful that accurate information in the hands of the public could lead to altered consumption. Finally, and ever increasingly, access can be diverted by laws deferring either to legitimate state interests or to special-interest pressures. The Freedom of Information Act's provisions provide some relief from the secrecy of government and of regulated areas. However, obtaining information from the commercial or professional sector about products or services is a separate issue. Until recently, the courts have been reluctant to address this problem, perhaps leery of interfering with either the legislative or the free market systems.

In essence, the courts have been faced with the dilemma of a Procrustean bed. They have been forced to choose between the public's right to know or the right of the state to follow tradition, to suppress competition within the professions and to discipline members of the bar and medical societies for conduct unbecoming a professional. Historically, restraints of advertising have the potential to violate two, distinct legal commands: the First Amendment and the Sherman Act.

Long considered the prerogatives of the "learned professions," the ethical codes of lawyers and doctors have restricted their members' commercial speech under the guise of protecting the public. Both the American Medical Association and the American Bar Association have a no-solicitation rule, given almost the force of law by the virtual control exercised by both these organizations. But the fact remains that the rules about who does and who doesn't advertise are in flux, with the flow all toward commercializing occupations that once seemed imbued with a condescension toward commerce. Many professionals also remain uneasy about the use and potential abuse of commercial speech.

Advertising by professionals has been regulated and restricted in the United States from the early 1900s until just a few years ago. A **de facto** patchwork of dicta from Supreme Court, lower court, Federal Trade Commission rulings and unilateral action by the professional organizations has effecitvely knocked down many of the prohibitions, one by one. However, though the time of professional advertising has come in the law books and debating societies, in the minds of most medical professionals it has not.

The rise of local consumer groups has been a constant thorn in the side of tradition and professional conformance. These groups have asserted the public's right to receive in the area of commercial speech in state after state since the mid-70s. They have acknowledged and used the penumbra of constitutional interpretation and the rhetoric of political theory. But the backbone of their movement has been an affirmative consumerism: the public's need and right to acquire information directly affecting its pocketbook.

Summary: In the area of commercial speech, courts today face two competing rights: the public's right to know and the state's right to discipline members of the medical profession. The FTC has taken strong action and legal precedents have been set in **Virginia Board of Pharmacy** and **Bates v. State Bar**. What are the implications for physician advertising?

CS532 7/2

"You can tell the ideals of a nation by its advertisements."

Norman Douglas

The constitutional protection of commercial speech is a relatively new phenomenon. Especially throughout the early decades of the 20th century, exposes of fraud and chicanery in advertising were made by journalists (in the area of health, Mark Sullivan exposed medical fakes and frauds in the **Ladies' Home Journal** in 1904), arousing public-spirited citizens, advertising men and medical societies. The year 1911 was a signal year in the history of advertising. In that year, the advertising industry itself advocated a model Printers' Ink statute directed against all forms of deceptive advertising. The **caveat emptor** (buyer beware), **laissez-faire** attitude toward advertising would never surface with as much vigor and virulence again. Also in 1911, the American Medical Association published the first volume of a series named, "Nostrums and Quackery." The Federal Trade Commission Act was passed in 1914 to supplement sanctions over unfair competition, which had been provided by the Sherman Anti-Trust Act of 1890 and by the Clayton Act of 1914.

Commercial advertising historically was denied a First Amendment protection. But the seminal case in denying constitutional protection to advertising as a form of communication was delivered in 1942 by the Supreme Court in **Valentine v. Chrestensen** (316 U.S. 52). The prevailing dicta in 1942 was that speech, in proposing a commercial transaction instead of an exposition of ideas, lacked full First Amendment protection. The aim of commercial speech was profit; its traffic, goods and services, not ideas; and its audience, potential buyers. But no court uttered that as sweepingly as in **Chrestensen.** For the next thirty years, courts would use the commercial speech doctrine enunciated there to deny or to limit First Amendment protection to advertising.

But it was reserved for subsequent refinements of the commercial speech doctrine and for pyramiding case law to further hone and delineate the real meaning and impact of the term, commercial speech. Justice Blackmun, in delivering the opinion of the court in **Virginia Pharmacy Board v. Virginia Consumer Council** (425 U.S. 748) in 1976, catalogued the courts' protection of speech in the form of paid advertisements. He stressed that First Amendment protection can go to publications that were not "purely commercial" [**Murdoch v. Pennsylvania** (319 U.S. 105, 111) and **Jamison v. Texas** (318 U.S. 413, 417)]; protection came even with a solicitation for money [as in **New York Times v. Sullivan** (376 U.S. 254) and **Cantwell v. Connecticut** (310 U.S. 296)]; or when a speaker's interest is predominantly economic and his proposal contains a mundane, commercial exchange. The speaker also was protected in **NLRB v. Gissell Packing Co.** (395 U.S. 575), a 1969 case involving contestants in a labor dispute. Although their interest was primarily economic, they merited First Amendment protection, according to the court, when they addressed the merits of the dispute so as to influence its outcome. In a similar case occurring in 1940 [**Thornhill v. Alabama** (310 U.S. 88)], the dissemination of information concerning the facts of a labor dispute was ruled, as a matter of public concern, to be legitimately guaranteed under the freedom of speech.

After citing this genealogy of commercial speech guarantees, Blackmun crystallized the nature of commercial speech by setting forth several fundamental characteristics. Blackmun spelled out four ways in which advertising is distinct from other speech, while still deserving of protection. He conceded that first, while the advertiser's interest is purely an economic one, in itself "that hardly disqualifies him from protection under the First Amendment." (425 U.S. at 762) However tasteless or excessive it may seem at times, all advertising has merit in that it serves an integral and indispensable function by disseminating consumer information on the price, availability and nature of the products and services. In short, the court said, it offers a way to allocate the resources of a free enterprise system.

This leads into Blackmun's second justification for commercial information: the public's stake in the free flow of information. Offering almost a commercial variant to the Freedom of Information concept, he listed precedents in which an ad, though entirely commercial, may still be of significant public interest to warrant protection. (For example: the court so agreed in regard to referrals for legal abortions in **Bigelow v. Virginia** (421 U.S. 809) (1978), or in notifying the public of the wildlife conservation values inherent in purchasing artificial furs in a 1973 case [**Fur Information and Fashion Council, Inc. v. E.F. Timme and Son** (364 F. Supp 16, SDNY)].

Blackmun elaborated on the ticklish issue of exceeding the bounds of exercisable judicial restraint. He wrote: "The choice . . . is not ours to make nor the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information and the dangers of its misuse if it is freely available that the First Amendment makes for us." (425 U.S. at 770).

Blackmun cited a fourth characteristic unique to commercial speech: its durability and its potential for greater objectivity. If the truth of an advertisement may be more easily verifiable (because its disseminator and originator are one in the same and, therefore, more likely to be cognizant of the facts than a detached news reporter — or so the court reasoned), then commercial speech may also be more durable and less likely to be chilled through judicial restraint. As a further check, the court also considered that disclaimers, warnings or additional information might be in order to prevent deception in advertisements.

Blackmun came full circle when he answered his own initial question succinctly: "Our question is whether speech which 'does no more than propose a commercial transaction' is so removed from any 'exposition of ideas' . . . that it lacks all protection. Our answer is that it is not." (425 U.S. at 762). Commercial speech, whether its content is commercial or factual and non-editorial, merits constitutional protection. But is that protection vouchsafed as a property right of the speaker or as the public's right, as hearers? Blackmun's answer was immediate and far-reaching: "Freedom of speech presupposes a willing speaker. But where a speaker exists, as in the case here, the protection afforded is to the communication, to its originator and to its recipients both." (425 U.S. at 756).

By such a stroke, however incidental, Blackmun linked the protection afforded commercial speech itself to the right-to-receive concept. The concept of the right of people to receive information has acquired increased judicial recognition within the last 10 years, but its interpretation is still ragged, and its existence sporadically recognized (**Martin v. Struthers** 319 U.S. 141, 143, 149). In **Martin,** a "judicial recognition of the right to receive had its genesis."[2] In Struthers, Ohio, a municipal ordinance forbade a person from actively distributing literature door-to-door. The Supreme Court in 1943 reversed the conviction of the Jehovah's Witness involved, stating that the ordinance abridged First Amendment freedoms: "The freedom to

distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." (319 U.S. at 143). The right-to-receive concept was recognized long enough in **Martin**, before being ignored subsequently in 1972. In **Kleindienst v. Mandel** (408 U.S. 753), the court reversed a district court ruling, recognizing a controlling and superior interest in the need and power of the government to exclude undesirable aliens. In his dissent, Justice Douglas said: "The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know . . . Thought control is not within the competence of any branch of government." (319 U.S. at 771-772).

Nevertheless, the right to receive, or synonymously the right to hear, as the Supreme Court uses it, derives its theoretical basis and strength from First Amendment interpretations. In holding to Justice Holmes' view that government is "a voluntary compact among political equals,"[3] it becomes the minds of the listeners, not the words of the speakers, which are of ultimate significance. That emphasis illustrates a subtle shade of difference between **Virginia Board's** explicit protection "to the communication" (425 U.S. at 756), and the emphasis in the right to receive on the hearers themselves. It is in the minds that the governing decisions must be formulated, and it is this citizen emphasis that the proponents of the right to receive stress. When either the speaker's or the listener's rights are censored, limited or interfered with, an injury results to the potential audience. This potentiality is the heart of the exercise of the right-to-receive concept. As Bill Aitchison in a 1975 **Georgetown Law Journal** article writes: "if the free flow of information is interrupted . . . the ability to receive and to cogitate new ideas is hampered."[4]

Cases involving the right to receive encompass a broad area -- anything from the receipt of information through the mail, to the right to possess obscene materials. to the right to hear in schools and via broadcast, to the consumer's right to receive via advertisements. A violation of the right may give the injured party standing to sue (as in **Martin**). Taken in tandem with the court's recognition of the value and significance of advertising, the effects of which, in many instances, are as great or greater than the impact of political thought, we can come easily to the Supreme Court's **Virginia Board** decision that "if there is a right to advertise, there is a reciprocal right to receive advertising . . . " (425 U.S. at 765). Information becomes communication when it reaches the mind of the receiver. Persons who are interested in their health or in the conservation of their economic resources through access to price information have as much right — some would say, an even greater right — to be as informed as the citizen about to vote in an election.

With the commercial speech doctrine defined and placed in its historical and theoretical context, we can now move to a more specific analysis of the two cases pivotal to the question of the professional/medical advertising: **Virginia Board of Pharmacy v. Virginia Citizens Consumer Council** (425 U.S. 748) and **Bates v. State Bar of Arizona** (422 U.S. 350).

> **"If man can make himself a real master of this art (of advertising), we may say that he has learnt his trade . . . . Let him know how to advertise, and the rest will follow."**
>
> **Anthony Trollope**

In 1976, in a 7-2 decision, the Supreme Court decimated whatever was left of the **Chrestensen** version of unprotected commercial speech. In this decision, a Virginia resident, who was required to take prescription drugs daily, and two non-profit consumer groups argued as plaintiffs that the First Amendment entitles consumers to receive information on prescription drug prices from advertising. On appeal from a U.S. District Court in eastern Virginia, the plaintiffs were able to argue successfully that knowledge of prices was vital to those individuals who must spend large portions of their income in this manner. The consumer-as-plaintiff distinguished this case from one five years earlier [**Patterson Drug Co. v. Kingery** (305 F. Supp 821)], in which the court had sustained a statutory ban on price advertising because the plaintiff, a pharmacist, had a **prima facie** commercial interest. By contrast, the Virginia Citizens Consumer Council "were asserting an interest in their own health that was 'fundamentally deeper than a trade transaction.' " (425 U.S. at 755; citing the **Patterson** case, 373 F. Supp at 686) The court was sympathetic to the interests of the needy consumer, acknowledging that the hardest hit — those who were aged, sick and poor — would be the least likely to comparison shop with their scarce dollars. In fact, said Blackmun, writing for the majority of seven, that commercial "interest may be as keen, if not keener by far, than (their) interest in the day's most urgent political debate." (425 U.S. at 763)

In first discussing the practice of pharmacy (stipulated as a professional practice affecting public health by the court), the court noted that the professional practice affecting public health by the court), the court noted that the profession was already subject to broad regulation in licensing, license-revocation and disciplinary sanctions of which the advertising ban was only a part. However, three states already had struck down their drug advertising ban by 1976. The court conceded that in the skill and expertise required of the pharmacist, there was an aspect of professionalism that the state has a strong interest in maintaining. The court dismissed most of the justifications for the advertising ban submitted by the professional association, in particular, pointing out five for extensive study:

- price advertising, the board argued, would dilute the degree of professionalism: "it will place in jeopardy the pharmacists' expertise and, with it, the customer's health." (at 767)

- it would jeopardize the patient's health by lessening the service aspect through increased corner-cutting and competitive pricing. Just as a pharmacist's professional services are time-consuming and, therefore, expensive, "competitors who economize by eliminating them are permitted to advertise their resulting lower prices, (then) the more painstaking and conscientious pharmacist will be forced either to follow suit, or to go out of business." (at 768)

- in addition to lowered service, drug prices would be inflated — the cost of advertising, the primary cause.

- the stable professional relationship between pharmacist and customer would be eroded. The loss, the board said, would be in individual attention and thehpractice of monitoring patients' health done by the neighborhood pharmacist.

- finally, the board defended its ban to protect the aura and professional image of pharmacists. With that tarnished, the status of the pharmacist would become that of a "mere retailer"; moreover, the image of "a skilled specialized craftsman attracts talent to the profession and reinforces the better habits of those who are in it." (at 768)

Overall, the court reacted negatively to these justifications, citing the board's own regulations as an effective device to monitor and maintain high professional standards in the state, and secondly, that the case at hand revolved more on retail sales, than it did on the pharmacists' professional standards or reputation.

Blackmun argued that the defenses of the ban comprised a "highly paternalistic approach" (at 770), which, in ostensibly aiming at protecting citizens, actually kept them in ignorance on the theory that, were they informed of prices, they would rush to the least expensive pharmacy regardless of its concern for quality. More persuasive, the court said was this alternative: if "this information is not in itself harmful, (the) people will perceive their own best interest . . . and the best means to that end is to open the channels of communication rather than to close them." (425 U.S. at 770) In addition, the court reasoned, the ban itself had deleterious effects. Blackmun foresaw the potential for even greater professional insulation and **de facto** control over consumer choice and market. He shrewdly assessed the advantages that would accrue to the established professional in these cases: the ad ban "insulate(s) him from price competition and . . . open(s) the way for him to make a substantial and, perhaps even excessive, profit in addition to providing an inferior service." (425 U.S. at 769) Even protection of the "most painstaking pharmacist" is "based in large part on public ignorance." (425 U.S. at 770)

But if the public interest is best served by being well-informed, and if suppression of price information hits hardest those least able to afford it, the court also defended the First Amendment protection to commercial speech on a third basis: the purely mundane level of a business transaction.

> Our pharmacist does not wish to editorialize on any subject, cultural, philosophical or political. He does not wish to report any particularly newsworthy fact or to make generalizations or observations about even commercial matters. The 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription at the Y price.' (425 U.S. at 761)

Price information, advertising at its most basic, was in itself enough. With drug prices varying drastically from outlet to outlet in any given locality, with mark-ups of as much as 650 percent in some areas, Blackmun insisted that access to that kind of information was too valuable to be abridged, even when consumers could come by it through some other means. (425 U.S. at 757)

The court, nevertheless, qualified its decision by citing several disclaimers and warnings. Blackmun cautioned that the protection of advertising should in no way be construed as a lifting of **all** regulations. Time, place and manner restrictions still apply when justified by content, or when they serve a "legitimate government interest." Nor would the court countenance any drug price advertisements that are false or misleading. "Untruthful speech, commercial or otherwise, has never been protected for its own sake," noted Blackmun. Finally, the decision did not include advertising by the electronic media. In a concurring opinion, Justice Burger warned that by its very nature professional advertising is bound to be somewhat misleading by virtue of the public's ignorance. "I doubt we know enough about evaluating the quality of medical and legal services to know which claims of superiority are 'misleading' and which are justifiable. Now I am sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases." (425 U.S. at 775)

That bit of prophecy would haunt the Supreme Court one year later when it deliberated over lawyer advertising in **Bates**, and, no doubt the specter of other professionals' advertising, including physicians, was behind Blackmun's footnote, reserving judgment on the effect of the **Virginia Board's** ruling on other professions:

> Although we express no opinion as to other professions, the distinctions, historical and functional, between professionals, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising. (425 U.S. at 773)

"He who advertises his name, loses it . . ."
The Talmud

Although Justice Rehnquist's dissent was vitriolic in **Virginia Board** (the "First Amendment speech provision . . . is demeaned by invocation to protect advertisements for goods and services") (433 U.S. at 404), the **Bates** case in 1977 sparked more controversy. Burger did not view **Bates v. State Bar of Arizona** as a logical extension of **Virginia Board.** While the latter dealt clearly with standardized, prepackaged drugs, he said, "routine legal services" vary and rarely can be standardized. But the 5-4 decision in **Bates** extends **Virginia Board** to the legal profession, and gives lawyers a constitutional right to advertise the prices at which they perform routine legal services. As such, it has served as a precedent for lower court rulings and easing of restraints by national professional organizations in the last two years for professionals as varied as masseurs, dentists, architects, podiatrists, opticians and chiropractors.

Bates v. State Bar of Arizona involved two Arizona lawyers, John R. Bates and Van O'Steen, who, after graduating with honors in 1972 from the Arizona State University College of Law, opened a legal clinic in Phoenix. Aiming to provide routine legal services at modest fees to persons of moderate income, the appellants set their prices to receive a relatively low return on each legal transaction, but to make up for that by substantial volume. After two years, they realized the need to advertise not only the availability of legal services at low cost, but the fees in particular. Their advertisement in the **Arizona Republic,** the Phoenix morning paper, offered "legal services at very reasonable fees" and contained the prices of uncontested divorces, uncontested adoptions, simple personal bankruptcies and changes of name. The state Supreme Court ruled the two had violated the rule.

In reversing the judgment, Blackmun wrote, speaking for the majority:

> The constitutional issue in this case is only whether the state may prevent publication in a newspaper of appellants' truthful advertisement concerning the availability of and terms of routine legal services. We rule simply that the flow of such information may not be restrained. (433 U.S. at 384)

The appellee's first justification for the ad ban echoed **Virginia Board** — namely, that professional advertising would have an adverse effect on the members of the profession and their image. This was countered in part by the statement: "the absence of advertising may be seen to reflect the profession's failure to reach out and serve the community." (433 U.S. at 370). In response to the second, that attorney advertising is inherently misleading, (a similar fear expressed in **Virginia Board** by Burger, 425 U.S. at 775) the court stated that "if the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." (433 U.S. at 375). The third justification held that advertising, in active solicitation of business, would stir up litigation, and that would have an adverse effect on the judicial system. The court's retort: advertising might indeed increase litigation, but "the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action" is untenable. (433 U.S. at 376). To the fourth justification — that advertising would result in higher fees and effectively bar entry to the profession for young attorneys — the court said, "It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer," and that such advertising would admittedly "aid the new competitor in penetrating the market." (433 U.S. at 377). The fifth justification for the ban on advertising was that the ads would result in a lower quality of service. Regardless of the client's needs, the attorney would be inclined to "package" his services, instead of tailoring or individualizing them. To this argument, the court said that "even if advertising leads to the creation of 'legal clinics' like that of the appellants' — clinics that emphasize standardized procedures for routine problems — it is possible that such clinics will improve service by reducing the likelihood of error." (433 U.S. at 378-79) The court rejected the sixth justification (that enforcement would be difficult) by stating: it is "somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." (433 U.S. at 379)

Controversial and complex, the **Bates** decision was affirmed in part and reversed in part: 7-2 in favor of advertising; 5-4 in favor of price advertising. Before **Bates,** judicial decisions on professional commercial speech had perpetuated a system in which the **established** professional was favored. Assured of clients and of building a reputation, the established attorney (or so, logic would run, also the physician, dentist, accountant or architect) was insulated from market pressures at the expense, often, of new entrants and of the general public. This was the contention of economic researchers Lee and Alexandria Benham, formerly at the University of Chicago, who concluded that:

> In this situation, the mechanisms of choice and control are assigned primarily to the **profession,** rather than to the **consumer,** and in the extreme case, the consumer has little or no information concerning the differentiating characteristics of the individual supplying services or the market prices for such services. (emphasis mine)[5]

The courts today face two competing rights: that of the public's right to know (public access and the implied right to receive) and that of the state to discipline members of a professional organization with internal regulatory powers for conduct unbecoming a professional. **Virginia Board** stands as a cornerstone to any discussion of professional commercial speech because it enunciated so clearly the legal precedents for First Amendment protection, as well as the rationale for a wider interpretation of the public's or the consumers' right to know. But, it is **Bates** that necessarily gives us the foundation upon which any judgment as to the legality of restraints on othe professional groups' advertising must rest. The majority opinion in **Bates** reiterates the reasoning found in **Virginia Board.** It echoes the earlier case's emphasis on the importance of advertising to the individual in a free enterprise society.

> **"A ship in a harbor is safe,**
> **but that is not that ships are built for."**
>
> **Shec'd**

We have seen that **Bates** creates a working assumption that the First Amendment would invalidate any unilateral ban on professional advertising. Assuming that the advertising in question would not fall under the still-prohibited categories of false, misleading or deceptive and would be appropriate under the time, place and manner restrictions still imposed, then we must consider the pivotal justifications cited in **Bates** for lawyer advertising. An underutilization of legal services was one of the chief justifications instrumental in the court's ruling in **Bates.** A survey conducted by the American Bar Association and the American Bar Foundation indicated that one-third of all Americans had never consulted a lawyer in their lives, while another third had done so only once.[6] Furthermore, millions of people did not know how to find a lawyer and tended, out of their naivete, to overestimate what lawyers would charge for their services. (433 U.S. at 370 n.22) The court in **Bates** recognized that the First Amendment impinged on this apparent failure of a delivery system for legal services.

However, this justification does not quite parallel the situation involving physician advertising. In the first place, there is a higher utilization of medical, rather than legal services. Studies have shown the average American receives some sort of medical attention at least three times a year.[7] An increase in demand, especially in certain areas, might overload existing delivery systems of medical care and become an economic and social problem. Nonetheless, few would maintain that the system of medical care is perfect in this country, or that an increase in the flow of information (even at the most basic level — the location of a physician's office, his hours and his speciality) would not be useful to the consumer in his search for a physician.

The advertising of specific fees, the most controversial and distasteful aspect of the **Bates** ruling for the former lawyers on the Supreme Court also has a bearing on physician advertising. As the economic testimony supplied by the American Bar Association indicated, price advertising is competitive and tends to induce lower prices. This, as well as the compelling need for consumers to know just this kind of basic, economic information, justified the protection in **Bates.** The inbred, **status quo** "paternalism" resulting from professional insulation and control over market factors, makes up another cross-over point between lawyer ad-

vertising in **Bates** and speculative physician advertising earning Supreme Court approval.

Though these differences exist between physician and attorney advertising, William C. Canby, professor of law at Arizona State University and counsel for Bates and O'Steen in their appeal to the Supreme Court, maintains in a 1978 **Duke Law Journal** article that, because patients exercise choice **initially** in choosing their doctors, and because economic factors still apply (many persons are still without medical insurance, or third-party payees),

> There is reason to expect that these consumers will have substantial impact at the margin as they exercise their choices and seek lower-cost services. The systematic competitive effect of advertising could thus have a significant effect on the medical profession. In addition . . . the physician may have conflicting economic interests in selecting procedures, and his lack of incentive to economize might contribute to the high rate of inflation in the field of health care . . . In other words, the situation is not likely to be greatly ameliorated in the absence of advertising to inform to consumer's choice.[8]

Canby suggests that the **Bates** decision, because it analyzes a specific advertisement and finds it to be protected, suggests two rules that could have application to physicians' advertising. "First," he writes, "a mere tendency or possibility of harm is not sufficient to permit suppression; the harm must be demonstrated. Second, the burden is on the regulatory authority to make the required showing."[9] Questions then blossom for physician advertising. Would the courts view suppression of an ad as a violation? Would self-regulation be a form of self-censorship, or would it be a sufficiently acceptable rule of reason? Do the ethical sanctions and rules of conduct, administered by state licensing boards but also given the force of law within local and state medical associations informally, constitute a hidden anti-turst area of potential trouble?

These questions can only be speculative at this point. Yet, even the American Medical Association was defeated in its attempt to retain its ad restrictions on its own members. The AMA, a virtual Goliath in terms of clout, money, authoritative prestige and members (roughly one-half of the nation's doctors are AMA members) enjoys a symbiotic relationship with the local ethical practices boards of the society, as well as with the state licensing boards. Ethical rules abound in medicine. Ostensibly, they are designed to ensure the integrity of the profession, to police their own members and to protect the public interests. This basis provides them with considerable disciplinary rights. The grounds for license revocation, for example, are considerable as they have been upheld by case law. A physician's license can be revoked if he fraudulently advertises that he can cure or has cured certain disease (**Doran v. State Board of Maine 54 A.R. 1504**), if he advertises concerning venereal disease (**Kennedy v. State Board of Registration** 145 Mich. 241), if he advertises he can cure without pain, or otherwise advertises in a false, fraudulent, intentionally misleading, self-laudatory or immoral manner.

Even without license-revocation, the ethical restraints on physicians, as exercised by their medical societies, are pervasive. Although state licensing boards have not exercised their revocation rights on advertising physicians, their ultimate sanction, expulsion, is enforceable and severe enough for it to bear results.[10] Expulsion for doctors can entail a loss of hospital privileges, a drying-up of referrals from other physicians, denial of speciality certification and loss or increased payments for medical malpractice insurance. For any physician, especially perhaps, those newest to the practice of medicine, these can be serious and damning indeed. Evidence such as this has led Lee Benham to write: "Professional norms (codes) may move the public more away from the espoused goal of more optimal, better utilization of health-care services."[11]

The American Medical Association's long-standing no-solicitation rule, which has, until recently, prohibited all advertising other than that which gives the name, office location and type of practice, lost in November 1979 before the Federal Trade Commission.

In December 1975, the FTC accused the AMA of illegally restraining price competition among AMA members by prohibiting them from advertising.

Members of the AMA first responded to the charges by saying doctor advertising would lead to "hucksterism" in the medical profession.[12] Then, after it had reviewed the charges, the AMA Judicial Council released (**New York Times**, 5-24-76) a report allowing doctors to advertise names, fields of practice, office hours, office addresses and some personal information, such as where the doctor received his degree. The council also declared as unethical the use of testimonials, claims of superior services or guarantees of sure-fire cures. In other words, doctors were not allowed to use comparative advertising.

The FTC opened hearings in September 1977 and finally, a year later (and three years after the charges were first made), the FTC reached a decision. FTC administrative law judge Ernest G. Barnes ruled that the AMA had caused substantial harm to the public through its prohibitions. These sanctions, he said, "serve to deprive consumers of the free flow of information about the availability of health-care services . . . ," have deterred "the offering of innovative forms of health care," and have "stifled the rise of almost every type of health-care delivery that would potentially pose a threat to the incomes of fee-for-service physicians in private practice."[13] The decision, accepted by the full commission, required the AMA to rescind all of its restrictions on advertising and issue new ethical guidelines in two years with FTC approval. The FTC contended that state and federal regulations were more than enough to police physician advertising, without the interference of the national or local medical societies. Since the decision, the AMA has appealed the decision and has shelved (Washington **Post**, 7-25-79) a revision of its ethical code until December 1980.

In addition to its attack on the AMA, the FTC initiated a similar battle with the American Dental Association's ban on dental advertising in January 1977. The commission said (Washington **Star**, 11-14-77) that the ADA's code of ethics fixed prices, deprived consumers of information important in the selection of a dentist and prevented the development of new systems of delivering dental care.

The ADA argued (Wall Street **Journal**, 11-30-77) that advertising would not make much difference in the cost of dental care. The cost of advertising, it explained, would be passed on to the consumer, and the actual fees were determined by the cost of providing dental care, which would not be changed by advertising. Despite its arguments, however, the ADA's House of Delegates advised local dental societies to stop punishing dentists who advertised. The societies were to allow ads that were fair, accurate and contained information about routine services.[14]

The plight of opticians, optometrists and opthamologists was similar to those of doctors and dentists. Professional codes and state laws prohibited each of these groups from advertising. Then, once again, the FTC stepped in, arguing that the professional codes violated the consumer's right of access to prices and services offered by professionals in the optical field. The FTC began hearings in 1977 to abolish the restrictions and state courts, as in the case of dentists and doctors, began ruling on the legality of state laws and optical association codes, soon after.

Meanwhile, a Senate subcommittee and a California consumer group were conducting studies into the effect of the advertising ban upon the American public. The monopoly subcommittee of the Senate's Small Business Committee accepted (Washington **Post**, 2-12-77) Sen. Gaylord Nelson's (D.-Wis.) announcement that state restrictions on eyeglass advertising resulted in overcharging and the unavailability of corrective lenses for the poor and elderly. One expert questioned in the study estimated the total excess charge to be $400 million per year. The California group's study revealed (Louisville **Courier-Journal**, 6-16-77) that few of the 112 million American eyeglass consumers were knowledgeable about the product they were buying. The study also indicated that prices are 25 percent to 40 percent higher in states having bans on advertising of eyeglasses.

Some members of the optometric community refused to accept the findings of the studies, but despite their opposition, the FTC ruled (Des Moines **Register**, 5-25-78) restrictions on price advertising of eye examinations and eyeglasses illegal. When the FTC reached its decision, 40 states had restrictions on such advertising.

The FTC's final decision on June 2, 1978, overrode all state laws restricting advertising of eye examinations, prescription glasses and contact lenses. Thus, opticians, optometrists and opthamologists were allowed to advertise prices of products and services after the law went into effect on July 3, 1978.[15]

Although the FTC has made a gallant and successful effort to reduce, if not eradicate, restrictions on physician advertising by medical societies. What is the likelihood that physician advertising could fall under the category of court-protected speech? An answer can only be surmised at this point, but we can extract guidance from one other source, in addition to case law and **Bates**: an analysis of previous arguments in support of suppressing professional advertising.

With each of the four arguments presented by the Arizona State Bar in **Bates** for suppression comes a distillate of consumer groups' arguments for a loosening of the ban.

Inherent deception, the fear that professional/medical advertising, by its very esoteric nature and complexity would be misleading, is the justification cited first by the State Bar, and we could also assume, would mirror the views of the AMA. A doctor's services defy the public's ability to evaluate and compare not only their efficacy, but the advertising claims used as well. Proponents of medical advertising disagree. They note that physicians have long had standardized rate sheets, numerically coded for easy accounting and filing, and that these, with their accompanying fixed, flat fees, are very likely to be used. Medical insurance policies certainly operate on the fixed fee basis, garnered from prevailing prices charged by physicians for medical services. Even if the information provided was for routine services, uncomplicated by exceptions necessitating individualized care, some information would be better than none, they argue.

A second claim is the averred decline in the quality of professional services should advertising become commonplace among physicians. Advertising proponents claim that the professional who would cut quality in order to increase profits would do so regardless of whether he advertised or not. Furthermore, the state's interest in policing and regulating the profession would be served already, if the state and local medical societies retain their sway and interest in this area. In addition, the consumer advocates argue, doctors should not, would not, be under any compulsion to provide only the stipulated "packaged" services announced in the ad. When a complicated medical problem occurred, the physician could take a loss in making good his advertised price claim, and then recapture that income on other services.

A third justification for banning physicians' ads is that the professional-patient relationships will be compromised, trust weakened, and the professional mystique eroded, the elite status faded. What is not certain is how irrevocable such a loss of trust might be — or even if it can be measured. The public has, assuredly, sensed a change in the nature of most professional practices. This has been expressed (Kansas City **Star**, 11-25-76) in a declining respect for most professionals, particularly physicians and lawyers. A study in **Medical Economics** has revealed that, whereas in 1969, less than 14 percent of the persons surveyed felt that the average doctor "sees medicine chiefly as a business," by 1976 that figure had climbed to 48 percent. Conversely, the number of persons who answered that the average doctor is "dedicated to helping people more than anything else" dropped from 86 percent in 1969 to 52 percent in 1976.[16] Persons in a 1977 Gallup poll who were asked, "How would you rate the honesty and ethical standards of people in these different fields?" ranked physicians second only to clergyman, however. Perhaps the discrepancy lies in the fact that the public realizes that the traditional definition of a profession is no longer entirely valid or sacrosanct. Physicians can no longer be realistically classified as altruistic, non-money-making professionals without a smattering of commercial instincts.

A fourth fear cited by opponents to physician advertising is that the costs of advertising and enforcement will necessarily and obviously raise the cost to the consumer. The proponents counter this by statements attesting to the fact that advertising prices produces a competitive, positive effect. In a well-documented study on "The Effect of Advertising on the Price of Eyeglasses," Lee Benham discovered that if "advertising is prohibited, the (sellers) . . . may not be able to generate the necessary volume to maintain the low prices."[17] Though his 1963 study is outdated, and prescription oculists and opticians have held the right to advertise for the past two years, Benham learned, "The estimates of eyeglass prices alone suggest that advertising restrictions in the market increase the prices paid by 25 percent to more than 100 percent."[18]

Legal arguments and conjecturing aside, the consequences of physician advertising are far-reaching and have heightened as advertising of related health-care products and services have proliferated in the last two years. Dentists, optometrists, plastic surgeons and alcoholism-treatment centers have begun to advertise, but few physicians themselves, with the exceptions of several high-population areas and their suburbs (such as around New York City, Los Angeles and Dallas), are advertising outside the telephone directory's information ads. In February, the American Society of Plastic and Reconstructive Surgeons even asked

the FTC to regulate advertising by a few of its members on the grounds that the ads gave false promise to what reasonably could be expected in terms of results. The city of New York itself requires accuracy and the listing of both low and high prices for each service described. Of all the medical professionals, probably dentists have begun to advertise most frequently and, at times, most stridently, since the American Dental Association lifted its ban on advertising last fall.

However, articles in daily newspapers and in national circulation magazines report a cacophony of opinions surrounding professional advertising in medicine. Dentists in New York City report their offices have been deluged (New York **Times,** 1-17-78) with calls as a result of large-scale, competitive advertising. Some even go so far as to link themselves next to a well-known commercial landmark [Milford D. Horner, Jr., D.D.S., advertised that his office could be found "next to Burger King" (New York **Times,** 1-7-78)]. Such ads bear a haunting, strangely prophetic resemblance to Rehnquist's colorful dissent in **Virginia Board.** Predicted Rehnquist, an open door policy on commercial speech would open the floodgates, elevating what was but the "commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain," to the "free market place of ideas." (425 U.S. at 781)

Yet, as late as mid-February 1979, officials in New York state report wide abuses and violations in dozens of daily ads offering the services of lawyers, dentists and chiropodists. The division of professional conduct of the State Education Department in New York, the regulatory body authorized to oversee false or flamboyant ads by professionals, reports over 200 disciplinary cases now pending which involve advertising by chiropodists and dentists. Physicians, whose services seem less amenable to competitive price advertising, occasion fewer infractions. The fear in the state appellate division is that confusion may result from the discrepancy in advertised prices for "routine" services than what is actually provided. Justice Aron Stevens says, (New York **Times,** 2-12-79, p. B-1), "Just what is deceptive is hard to say. . . . Every case is different."

On November 28, 1977, New York was the first state to approve a comprehensive set of professional conduct rules which permit physicians, dentists, therapists, and 26 other professional groups to advertise. The advertising language sought tries to strike a balance between unlimited advertising and the prevailing exclusionary laws in effect in many other states. Typical of the "factually accurate and dignified" advertising that New York views (New York **Times,** 7-29-77, p. A-1) as prototypical is this ad for a doctor's services: "We do abortions for $100."

But greater concern among physicians and their patients alike may very well be in the competence, not the economy of the practioner. Another concern rests with the medical profession itself — traditionally trained, cohesive, and conservative, many members do not deviate willingly or widely from the accepted norms, nor do they look with favor upon physicians who do. Their opinion may be echoed in the views of a San Diego physician and member of the California Medical Association. In an interview April 7, Dr. Robert Brier, a newly licensed physician and member of the Smith-Hanna Medical Clinic (which does not advertise), said that he believed it was possible for the medical society's sanctions, as well as the chill on professional relationships among physicians, to inhibit advertising by some doctors. Those who would resort to direct advertising would always remain in the distinct minority, the "outer fringe of the profession," he said. But, he continued, "If you're going to direct advertising, you don't care much about referrals, because you're going beside the books and directly to the patient." Brier said he has never advertised, nor would be ever plan to do so. Those doctors "who would advertise and would raise the hue and cry about cut-rates . . . would not care what the medical society thought of them, anyway." A doctor deals in intangible, professional judgment in his services, hard to quantify, hard to advertise, hard to protect. Patients realize this, he said, knowing they have a bad experience with a lawyer," he went on, "they've lost only money. If they have a bad experience with a doctor, they know it has an impact on their health."

So the debate is likely to continue on the merits and demerits of physicians' advertising. But, like road signs at a crossroads, each inkling and development, however minor, points toward the future. The court that arbitrates the first and landmark case in physician advertising will not only have the controlling precedents in **Virginia Board** and **Bates** and the wider scope they offer of the First Amendment, but also perhaps, the weight of evidence from the much-maligned marketplace. Whatever short-range consequences physicians' advertising may have in the next few years, the reception they and their commercial speech receive, and their concommitant success or failure, will surely impinge on the final judicial decision.

FOOTNOTES:

1. Barbara Tuchman, **A Distant Mirror: The Calamitous 14th Century** (New York: Alfred A. Knopf, 1978), p. 106.
2. Richard Oborn, "The Right to Receive," (FOI Report No. 380) p. 3.
3. Alexander Meiklejohn, **Political Freedom** (New York: Oxford University Press, 1961), p. 13.
4. Bill Adchison, "The Right to Receive and the Commercial Speech Doctrine," **Georgetown Law Journal** 63 (1975): 791-792.
5. Lee and Alexandria Benham, "Regulating Through the Professions: A Perspective on Information Control," **Journal of Law and Economics** 18 (October 1975): 421.
6. B. Curran and F. Spalding, **The Legal Needs of the Public** (Chicago: American Bar Foundation, 1974): 85-86.
7. U. S. Department of Health, Education and Welfare, "Physician Visits: Volume and Interval Since Last Visit, United States, 1969," (Washington: GPO, 1970): 3.
8. William Canby and Ernest Gellhorn, "Physician Advertising: The First Amendment and the Sherman Act," **Duke Law Journal** 2 (1978): 552.
9. Ibid., p. 553.
10. Donald E. L. Johnson, "Court Rulings Unleash Health Care Advertising," **Advertising Age,** April 2, 1979, pp. S-13.
11. Benham, "Regulating Through the Professions," p. 446.
12. Tom Nicholson, "Advertising: Doctor's Dilemma," **Newsweek,** January 5, 1976, pp. 63-64.
13. Johnson, "Court Rulings Unleash Health Care Advertising," p. S-12, 13.
14. Robert W. Merry, **Wall Street Journal,** "Amid the Gnashing of Teeth, Dentists Start to Advertise," November 30, 1977, p. 1.
15. **Federal Register,** 43 (June 2, 1978): 23992.
16. G. Eisenberg, "Where the Rapport Breaks Down," **Medical Economics,** November 29, 1976, p. 10.
17. Lee Benham, "The Effect of Advertising on the Price of Eyeglasses," **Journal of Law and Economics** 137 (October 1972): 341.
18. Ibid., p. 348.

Additional copies of this report, and other Freedom of Information Center reports, may be obtained by writing the Center at Box 858, Columbia, Missouri 65205. There is a $1 charge for each single copy, 90 cents each for 25 or more copies, $60 per 100 copies, and $50 per 100 on orders of 300 or more copies.